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Supreme Court of the United States

October Term, 1970

No. 116 S

STEPHEN DASH, NANCE SEWELL, ALVIN M. WEBB, EDILBERTO CHAPARO, JOSEPH F. COLE, ANDREW C. FULLEY, HUBERT L. GRAJARD, EUGENE J. RUDDER, CURTIS E. MAYS and JOSEPH MILES,

Petitioners,

—against—

THE COMMANDING GENERAL, Fort Jackson, South Carolina, and SECRETARY OF THE ARMY, Washington, D.C.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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INDEX

	Page
Opinions Below	1
Jurisdiction	1
Questions Presented	2
Statutes Involved	2
Statement of the Case	2
Reasons for Granting the Writ	9
Conclusion	18
Appendix A—Statutes and Regulations	19
Appendix B—Opinion of the Court of Appeals	22
Appendix C—Judgment of the Court of Appeals	24
Appendix D—Opinion of the District Court	25

CITATIONS

Cases:	Page
Brown v. Louisiana, 383 U.S. 131	16
Brukiewa v. Police Commissioner, 253 A.2d 210 (1970)	12
Burnside v. Byars, 363 F.2d 744 (5th Cir. 1966)	12
Chaparro v. Reese, 412 F.2d 443 (4th Cir. 1969)	11
Food Employees v. Logan Plaza, 391 U.S. 308	12
Hague v. C.I.O., 307 U.S. 496	17
In re Brown v. Brown, ___ F. Supp. ___ (E.D. Mich. 1970), 3 SSLR 3404	11, 12, 13
Interstate Circuit, Inc. v. Dallas, 390 U. S. 676	17
Kunz v. New York, 340 U. S. 290	16, 17
Levy v. Corcoran, 389 F.2d 929 (D.C.Cir. 1967)	11
Levy v. Parker, 396 U.S. 1204	11
Marsh v. Alabama, 326 U.S. 501	11
Muller v. Conlisk, 429 F.2d 901 (7th Cir. 1970)	12
New York Times v. Sullivan, 376 U.S. 254	15

Cases (Continued): Page

Orloff v. Willoughby, 345 U.S. 83 12

Pickering v. Board of Education, 391 U.S. 563 12

Reaver v. Ainsworth, 219 U.S. 296 12

Republic Aviation Corp. v. N.L.R.B., 324 U.S. 793 12

Resistance v. Commissioners, 298 F. Supp. 961 (E.D. Pa., 1969) 16

Roth v. United States, 354 U.S. 476 15

Saia v. New York 334 U.S. 558 17

Saunders v. Westmoreland, Civil No. 1358-69 (D.D.C. 1969) 11

Schneider v. State, 308 U.S. 147 ..... 12, 13

Shuttlesworth v. Birmingham, 394 U.S. 147 ..... 16, 17

Staub v. City of Baxley, 355 U.S. 313 17

Stromberg v. California, 283 U.S. 359 15

Terminiello v. Chicago, 337 U.S. 1 16

Thornhill v. Alabama, 310 U.S. 88 ..... 13, 15

Tinker v. Des Moines School District, 393 U.S. 503 ..... 11, 12, 13, 16

Cases (Continued): Page

Tinker v. Texas, 326 U.S. 317 10-12

United States v. Avcock, court-martial affirmed, Judge Adv. Gen. of Navy, (Feb. 4, 1970) 11

United States v. Daniels, 19 U.S.C.M.A. 329, 42 C.M.R. 131 (1970) 11

United States v. Gray, 20 U.S.C.M.A. 63, 42 C.M.R. 255 (1970) 11

United States v. Harvey, 19 U.S.C.M.A. 339, 42 C.M.R. 131 (1970) 11

United States v. Howe, 17 U.S.C.M.A. 165, 37 C.M.R. 429 (1967) 11

United States v. Priest, Navy Court-Martial No. 70, 232 (1970) 10

United States v. Rabel, 389 U.S. 254 13

Witryk v. Rafalko, Civil No. 3988 (S.D. Ohio, 1970) 11

Wood v. Georgia, 370 U.S. 375 15

Yahr v. Resor, 431 F. 2d 690 (4th Cir. 1970, petition for certiorari pending Oct. Term, 1970 ..... 11, 17

Constitutional, Statutory and Regulatory Provisions

Constitution:

First Amendment 2, 7, 9, 12, 13, 15

Page

Statutes:

10 U.S.C. §882 16

10 U.S.C. §889 16

10 U.S.C. §892 16

10 U.S.C. §917 16

18 U.S.C. §1381 16

18 U.S.C. §2387 16

28 U.S.C. §1254(1) 2

Regulations:

Army Regulation 210-10, ¶5-5 ..... 2, 16

Fort Jackson Regulation 600-30 ..... 2, 6, 7, 9, 16

Other Authorities

Adjutant General's Memorandum "Guidance on Dissent" Dept. of the Army, May 28, 1969 10

Bishop, *Collateral Review of Courts Martial*, 61 Columbia L. Rev. 40 (1961) 13-14

Brown, *Must the Soldier Be a Silent Member of Our Society*, 43 Mil. L. Rev. 71 (1969) 10

Commonweal, September 19, 1969 ..... 7, 10

Department of Defense Directive 1325.6, Sept. 12, 1969 ..... 10, 16

Joint Hearings before Sub-Committee on Constitutional Rights of the Committee on the Judiciary, 89th Cong. 2d Session 14

Page

Lewis, *Freedom of Speech—An Examination of the Civilian Test for Constitutionality and Its Application to the Military*, 41 Mil. L. Rev. 55 (1968) 10

Life Magazine, May 23, 1969 10

Nation, April 7, 1969 10

New Republic, December 6, 1969 10

Newsweek, August 31, 1970 10

New York Times:
- May 18, 1969 10
- June 5, 1969 14
- January 25, 1970 11
- February 22, 1970 10
- December 17, 1970 13

Note, *Citizen Servicemen and Their Constitutional Rights*, 43 Temple L.Q. 213 (1970) 10

Note, *Dissenting Servicemen and the First Amendment*, 58 Georgetown L.J. 534 (1970) 10

Riffkind, G.I. Rights and Army Justice (1970) 10

Sherrill, Military Justice is to Justice as Military Music is to Music (1970) 10

Sub-Committee on Constitutional Rights of the Committee on the Judiciary, 87th Cong. 2d Session 14

Warren, *The Bill of Rights and the Military*, 37 N.Y.U.L. Rev. 181 (1962) 13

Washington Star, December 16, 1970 13

Supreme Court of the United States

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No.

STEPHEN DASH, *et al.*,

Petitioners,

—against—

THE COMMANDING GENERAL, Fort Jackson, South Carolina, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioners respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit, entered on September 2, 1970, which affirmed the judgment of the United States District Court for the District of South Carolina denying the petitioners relief.

Opinions Below

The opinion of the Court of Appeals is reported at 429 F.2d 427 and is set forth at Appendix B. The opinion of the District Court is reported at 307 F. Supp. 849 and is set forth at Appendix D.

Jurisdiction

The judgment of the Court of Appeals was entered on September 2, 1970 and is set forth at Appendix C. The time

within which to file the petition for certiorari was extended to December 24, 1970. The jurisdiction of this Court is invoked under 28 U.S.C., §1254(1)

Questions Presented

1. Were petitioners, servicemen in the Armed Forces stationed at Fort Jackson, South Carolina, denied their First Amendment rights by the refusal of their Post Commander to allow them to hold a peaceful meeting on post after duty hours to discuss the Vietnam war and other matters of public interest?

2. Does Fort Jackson Regulation TC 600-50, which prohibits the distribution of printed material on post without the prior approval of the Post Commander and which provides no standards for such approval, violate the First Amendment?

Statutes Involved

The statutes involved are Army Regulation 210-10, ¶5-3 and Fort Jackson Regulation TC 600-50, ¶¶1, 2 3 (d) (hereinafter called "F.J. Reg."). They are set forth at Appendix A.

Statement of the Case

In January, 1969, a group of G.I.'s stationed at Fort Jackson, South Carolina began to hold informal meetings in their barracks to discuss matters of public concern, such as the war in Vietnam, black control of black communities and racial tension in the country (A.II 265).[1]

In February, the group, which had by now taken the name of "G.I.'s United Against the Vietnam War", began to circulate

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1. The designation "A.II." is employed for references to Volume II of the Appendix in the Court of Appeals. This volume contains the transcript of an Article 32 proceeding involving several of the petitioners herein held at Fort Jackson, South Carolina on April 22-25, 1969. The Article 32 proceeding is discussed more fully at p. 6 of the petition.

a petition among the servicemen at Fort Jackson (A.I. 86).[2] This petition which was addressed to the Commanding General of Fort Jackson, read in part as follows:

> "We the undersigned enlisted men, stationed at Fort Jackson, South Carolina, request permission to hold an open meeting on post on 26 Feb. 1969, at which all those concerned can freely discuss the legal and moral questions related to the war in Vietnam and to the civil rights of American citizens both within and outside the armed forces. It is our intention to hold a peaceful, legal meeting open to any interested man or officer at Fort Jackson. We desire only to exercise the rights guaranteed to us as citizens and soldiers by the First Amendment to the U.S. Constitution.
>
> "We believe that the best way to avoid further incidents such as have occurred at Fort Jackson recently, is by full discussion and clarification of our rights as citizens.
>
> • • •
>
> "One of the purposes of this meeting will be the preparation of a petition to the Department of the Army and Congress expressing the sentiments of the GIs attending the meeting about the war in Vietnam." (A.I. 14-15.)

On Monday, March 3, 1969, two of the petitioners herein, Cole and Dash, took the petitions, which had been signed by over 300 men, to Post Headquarters in order to present them to the Post Commander. Attached to the petitions was a hand-written letter by Private Rudder, another of the petitioners herein, expressing the desire of the servicemen for a "mass,

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2. The designation "A.I." is employed for references to Volume I of the Appendix in the Court of Appeals. This volume contains the pleadings, affidavits and opinion of the District Court.

democratically conducted meeting open to all GIs at Fort Jackson to freely discuss the war in Vietnam and the other specified areas of concern." (A.I. 17) The letter requested the Commanding General to provide facilities for such a meeting, and suggested it could be held "on post, at a reasonable hour and after normal duty hours on 12 March 60." *(Ibid.)*

At Post Headquarters, Cole and Dash reported to Lt. Col. Stickel, the Post Information Officer, who referred them to Major Smith, the Staff Duty Officer. Major Smith read a prepared statement that the Army did not recognize "collective bargaining" and hence would not accept the petitions. None of the Army officials looked at the petitions. Major Smith ordered Cole and Dash to return to the barracks and they accordingly saluted and left. (A.I. 107-108, 27-29, 31-32.)

Earlier, on December 7, 1968, petitioner Cole was distributing copies of Short Times, a G.I. newspaper which was written and circulated by enlisted men at Fort Jackson. The papers were taken from Cole and he was told that he was under investigation for distributing unauthorized literature. (A.I. 84.) His commanding officer, Lt. Carter, gave Cole a direct order not to distribute the Short Times, or any similar publication. *(Ibid.)*[3] Cole complained that it was unconstitutional to prevent distribution of newspapers, and was told he would have to go through channels. He took his complaint to Lt. Col. Wright, the

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3. At this time there was in existence at Fort Jackson TC Reg. 600-50 which listed as "Prohibited Practices" the following, among other things:

> "3a. Picketing, demonstrations, sit-ins, protest marches, political speeches, and similar activities are prohibited and will not be conducted on the post except as provided herein. b. The post commander may grant exceptions to the policy contained in this paragraph. Applications for exceptions shall be submitted in writing to the Provost Marshal at least seven days prior to the date of the proposed demonstration or other activity. . . d. Distribution on the reservation of material such as pamphlets, handbills, and flyers is prohibited without the approval of the Post Commander."

Subdivision "d" was amended on March 13, 1969, Appendix A, p. 21.

Battalion Commander. Lt. Col. Wright told Cole that he wasn't going to tolerate this "anti-war horse shit" or people going around influencing or changing the minds of men in the battalion. Cole was told that he was wrong in printing this "anti-war shit" and that he, Lt. Col. Wright, was not going to tolerate it. (A.I. 85.)[4]

Cole then took his complaint to Lt. Col. Trippitt in the Inspector General's office. Trippitt read Cole the Post Regulation prohibiting the distribution of "publications such as books, periodicals, pamphlets, handbooks, flyers, advertisements and similar printed material" without the express permission of the Post Commander. Cole asked whether the regulation was constitutional. Trippitt replied that he could not answer the question and that it was a question for the lawyers to figure out. He dismissed Cole with the statement "Don't ask too many questions. Your only duty is to obey orders and die proudly." (A.I. 86.)

On March 20, 1969, General Hollingsworth, the Commanding General at Fort Jackson, visited the campus at Presbyterian College in Clinton, South Carolina, and spoke to a group of faculty and students. He stated that the college campuses were "fermenting liberalism" and promised when his men returned from Vietnam they would take care of the "liberal, hippy, war-protesting students," throw the liberal professors out the window and throw their liberal books out on top of them. General Hollingsworth was asked about the soldiers who had been dissenting against the Vietnam war at Fort Jackson. He stated that this was the best place in the world for them since they would get fair and just treatment "rapidly". He stated that his main problem at Fort Jackson was keeping the

4. Lt. Col Wright, in an affidavit in support of the Government's motion to dismiss the complaint, confirms that this conversation took place with Cole. His affidavit, however, denies that he used the word "shit". (A.I. 131.)

"good men" from getting to them, the "Communists". (A.I. 118-119, 120.)

On the evening of March 20, several members of GIs United Against the Vietnam War held a brief spontaneous meeting after duty hours outside of one of the barracks. The members gave impromptu speeches about G.I.'s United and their feelings towards the Vietnam war. Although the following day eight of the servicemen participating were arrested and charged with violating the Uniform Code of Military Justice in that they allegedly behaved disrespectfully toward a superior officer (Article 89), allegedly caused a breach of the peace by unlawfully "demonstrating" and making "speeches" (Article 116) and allegedly violated F. J. Reg. 600-50 by "demonstrating" (Article 92), subsequent investigation of these charges[5] found that the evidence did not support a prima facie case of disrespect and breach of the peace.[6] The investigating officer did find a prima facie case of violation of F. J. Reg. 600-50, the validity of which is challenged here. Nevertheless, he recommended that no courts-martial proceedings be instituted. These recommendations were adopted by the Post Commander and the courts-martial charges against the arrested servicemen were dropped.

Because of his activities in G.I.'s United, and in the circulation of the petition, Dash was informed on March 24, 1969 that his pass privileges were suspended. Dash pursued this denial of pass privileges through the chain of command up to an

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5. The investigation, which was a proceeding conducted under Article 32 of the Uniform Code of Military Justice, was held at Fort Jackson on April 22-25, 1969.

6. Contrary to the findings of the investigating officer, the District Court here found that this March 20 meeting "had created disorder, fomented dissension and gave rise to serious breaches of discipline". Appendix D, p. 39. The District Court cited no evidentiary support—indeed there is none—for its conclusions.

interview on March 27 with Col. Maertens, 4th Brigade Commander. Maertens referred to the G.I.'s United organization, the petition campaign and related developments. Maertens told Dash "We know you are the brains behind all this; you have been too careful and too smart for us to put you in the stockade like the others, but if you slip up we will get you too." Dash asked Maertens how he would feel if he were ever to discover that a majority of the American people do not approve of the war in Vietnam. Maertens replied that this may be so, that the President and Congress have had a very difficult time selling this war to the public; that Dash had no right to be expressing anti-war views, and if it were up to Colonel Maertens, Dash would not get another pass so long as he remained at Fort Jackson. (A.I. 113-114, 125-126.)

Maertens agreed with Dash that GIs remained citizens while in the Armed Forces and that the Army did not possess a higher authority than the Constitution. He explained, however, that he definitely felt that the Constitution did not apply to GIs, particularly its First Amendment rights and the Bill of Rights. (A.I. 114.)

On April 1, 1969 petitioners instituted the present action in the District Court of South Carolina, both on their own behalf and on behalf of the class of servicemen stationed at Fort Jackson. They sought a declaratory judgment that (a) they and members of their class have a constitutional right (1) to hold public meetings at Fort Jackson for the purpose of peaceful discussion of public matters of concern to themselves and the American citizenry in general, and (2) to prepare, circulate, and present petitions of grievances to the respondent Commanding General and to the Congress of the United States; and (b) that the provisions of the F. J. Reg. 600-50, prohibiting the distribution of pamphlets, handbills and flyers without the prior approval of the Post Commander, are invalid because they conflict with the First Amendment. (A.I. 11.)

The petitioners also sought an order directing the Commanding General to grant to them and members of their class suitable facilities for the purpose of holding peaceful meetings on Post for the discussion of public issues with such meetings to be held at a suitable time and place and in such a manner as not to disrupt and interfere with the carrying out of regular military activities. (A.I.12.)

The government then moved to dismiss the complaint upon the grounds (1) that if failed to state a claim upon which relief could be granted, and (2) that the court lacked jurisdiction over the subject matter. Alternatively, the government moved for summary judgment. (A.I. 18.) In support of its motion, the government submitted affidavits acknowledging that the Post officials (Lt. Col. Stickel and Major Smith) refused on March 3 to accept or even read the petition presented by petitioners on the ground that acceptance of the petition would amount to "collective bargaining". (A.I. 28-32.) In his affidavit, General Hollingsworth stated that, having read the petition (which was attached as an exhibit to the complaint):

> "...I can unequivocally state that granting the request contained therein would now and would have then been detrimental to the morale, good order and discipline of my command. Soldiers' rights are not absolute. Success in combat, in fact survival on the battlefield, is dependent on the authority of the commander and the discipline and obedience of all soldiers. A commander cannot bargain with subordinates." (A.I. 35.)

The petitioners then cross-moved for summary judgment. (A.I. 78-79)

Finding that there was no dispute on the facts, the District Court issued an opinion granting the government's motion for summary judgment. The court rejected the government's threshhold contentions that the case was moot because the

named petitioners had been transferred from Fort Jackson or discharged from the Army prior to the oral argument, and that the petitioners had failed to exhaust their administrative remedies in the Army, Appendix D, p. 28. On the merits, the court held that the Post Commander had "a proper basis for refusing to grant the request for an open meeting", and that this refusal did not constitute an infringement of petitioner's First Amendment rights, Appendix D, p. 37. The court further held that F. J. Reg. 600-50 was constitutional, Appendix D, p. 35.

The Court of Appeals, in a brief one paragraph opinion, affirmed the decision on the basis of the District Court opinion, Appendix B, p. 23.

Reasons for Granting the Writ

1. This case presents for review the important question of the extent to which the First Amendment guarantees of free speech and assembly apply to servicemen stationed in the United States. The need for a prompt resolution of this question by this Court has assumed an importance far beyond that of earlier years. This is due both to the tremendous expansion of the Armed Forces during the past 25 years and to the fact that servicemen have begun to speak out on public issues in a fashion heretofore unknown in the military.

The question of the extent to which servicemen possess rights of free speech and assembly has arisen in the context of the great national debate about Vietnam. This is a debate which has involved the whole nation, engaging the attention not only of the country's leaders, but of all segments of society, students, workers, housewives and intellectuals alike.

It was inevitable that servicemen who are most affected by the course of events in Southeast Asia would have sought to

join this debate.[7] As a consequence, the issue as to the right of servicemen to participate in this debate and the terms under which they may do so has become a major subject of controversy in the press, legal publications, the military, the Court of Military Appeals, and civilian courts.[8]

However, this Court has never discussed these questions nor given any guidelines to the military or the lower courts on how they should be resolved. The pressing nature of these questions calls for prompt resolution by this Court.

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7. At nearly every military installation in the United States GI's are publishing newspapers similar in content to the one published at Fort Jackson. *Commonwealth*, September 19, 1969, p. 539. The distribution of these papers are subject to the same regulations as F. J. Reg. 600-50 and have led to the same conflict and controversy. See, e.g., courts-martial of Pvt. Arthur Small, Fort Eustis, Nov., 1970, Sgt. Ronnie Bisson, Wright-Patterson A.F.B., July 1969, Pvt. Peter Bilezarian, Ft. Dix, June 1970; Pvt. Charles Cedeno, Ft. Ord, Nov. 1970; Pfc. Ed. Horvath, Ft. Hood, March 1969, all for having distributed publications on base without the prior approval of their base commander.

8. For a representative selection of articles in the press and legal publications, see, e.g., *New York Times Magazine Section*, Feb. 22, 1970, p. 32; *id.*, May 18, 1969, p. 25; *Commonwealth*, Sept. 19, 1969, p. 539; *New Republic*, Dec. 6, 1969, p. 5; *Life Magazine*, May 23, 1969, p. 28; *Newsweek*, Aug. 31, 1970, p. 18; *Nation*, April 7, 1969, p. 432; "The Soldier's First Amendment Rights: Freedom of Expression," Chap. 5 of Robert Rifkind *G.I. Rights and Army Justice* (1970); "Putting Down Dissent." Chap. 5 of Robert Sherill *Military Justice is to Justice as Military Music is to Music* (1970) Note, *Citizen Servicemen and Their Constitutional Rights*, 43 Temple L.Q. 213 (1970); Note, *Dissenting Servicemen and the First Amendment*, 58 Georgetown L.J. 534 (1970); Brown, *Must the Soldier be a Silent Member of our Society*, 43 Mil. L. Rev. 71 (1969); Lewis, *Freedom of Speech—An Examination of the Civilian Test for Constitutionality and Its Application to the Military*, 41 Mil. L. Rev. 55 (1968).

In the military the serviceman's right to publish and distribute newspapers containing anti-war views is recognized by the Adjutant General's Memorandum "Guidance on Dissent", Dept. of the Army, May 28, 1969; and the Dept. of Defense Directive, Sept. 12, 1969. But see, *United States v. Priest*, Navy court-martial No. 70,232 (Navy seaman court-martialed

2. The rights sought to be exercised here—peaceful speech, assembly and press—are the classic rights "entitled to comprehensive protection under the First Amendment", *Tinker v. Des Moines School District*, 393 U.S. 503, 506.[9] Yet the decisions below have effectively denied the exercise of these rights.[10] Although asserting in the abstract the principle that servicemen do have First Amendment rights, the principle was negated in

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for publishing anti-war publication); *United States v. Averch* (Marine's special court-martial conviction for expressing in newspaper his opinion of Vietnam war while stationed in Vietnam, aff'd by Judge Advocate General of Navy on Feb. 4, 1970); *New York Times*, Jan 25, 1970, p. 8, Col. 1 (four servicemen stationed at Fort Gordon, Georgia, were charged with violating the Uniform Code of Military Justice because of their distribution of leaflets regarding a GI's war crimes commission).

The Court of Military Appeals has given recognition to the First Amendment rights of servicemen in principle but not in practice, see e.g., *United States v. Gray*, 20 U.S.C.M.A. 63, 42 C.M.R. 255 (1970); *United States v. Harvey*, 19 U.S.C.M.A. 539, 42 C.M.R. 151 (1970); *United States v. Daniels*, 19 U.S.C.M.A. 529, 42 C.M.R. 131 (1970); *United States v. Howe*, 17 U.S.C.M.A. 165, 37 C.M.R. 429 (1967).

See, the views expressed in *Voir v. Resor*, 431 F. 2d 690 (4th Cir. 1970), petition for certiorari pending; *Levy v. Parker*, 396 U.S. 1204, (bail granted by Mr. Justice Douglas in a case where a serviceman alleged he was convicted by a court-martial for exercising First Amendment rights. The Justice expressly noted that, "The extent to which First Amendment rights available to civilians are not available to servicemen is a new and pressing problem." *Id.* at 1205; bail was later continued by the full Court, 396 U.S. 894.) The important but open nature of the question was also recognized by the Court of Appeals for the District of Columbia Circuit in *Levy v. Corcoran*, 389 F. 2d 929 (D.C. Cir. 1967). Similarly see *Chapoco v. Resor*, 412 F. 2d 443 (4th Cir. 1969); *In re Brown v. Brown*, ____ F. Supp. ____ (E.D. Mich. 1970), 3 SSLR 3404; *Witryk v. Rafalko*, Civil No. 3968 (S.D. Ohio, 1970); *Saunders v. Westmoreland*, Civil No. 1360-69 (D.D.C. 1969).

9. This case raises no issue of the right of servicemen to disobey orders, to breach discipline, or to engage, as the respondents assert, in "collective bargaining" (*Supra*, p. 8.)

10. The court argued that servicemen have First Amendment rights "off base and as individual citizens", Appendix D, p. 38. This would in effect allow servicemen to exercise their rights every place except where they presently are stationed. *Marsh v. Alabama* 326 U.S. 501; *Tinker v.*

practice by the holding that these rights may be limited in the discretion of the military commanders and that the exercise of such discretion is not subject to judicial review. The lower courts reached this conclusion as a result of several basic misconceptions.

a. The District Court stated that "judges are not given the task of running the Army" and that courts must give "deference to [the] military", Appendix B, pp. 31-32.[11]

First, petitioners did not request the court to "run" the Army. They merely sought a declaration that they, like civilians, have First Amendment rights to express themselves on matters of public importance. Such a request no more requires a court to "run" the Army than *Tinker v Des Moines, supra, Pickering v. Board of Education*, 391 U.S. 563 and *Burnside v. Byars*, 363 F. 2d 744 (5th Cir. 1966), requires the courts to "run" public schools, or *Muller v. Conlisk*, 429 F. 2d 901 (7th Cir. 1970), and *Brukiewa v. Police Commissioner*, 263 A. 2d 210 (1970), require the courts to "run" police departments.

Secondly, for civilian courts to give "deference" to military decisions where First Amendment rights are involved runs

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Texas, 326 U.S. 517; *Republic Aviation Corp. v. N.L.R.B.*, 324 U.S. 793. The petitioners live and work at Fort Jackson. The Army asserts that it has the right to prevent a serviceman from leaving the post by denying him a pass (A.I. 125). Thus, for those who are denied the privilege of receiving a pass, as for example petitioner Dash, *see supra*, p. 6-7, the right to free speech off post is an empty one. Furthermore, a right of expression may not be "abridged on the plea that it may be exercised in some other place." *Schneider v. State*, 308 U.S. 147, 163; *Food Employees v. Logan Plaza*, 391 U.S. 308, 318, 323-324.

11. The cases relied upon by the District Court, *Reaves v. Ainsworth*, 219 U.S. 296, and *Orloff v. Willoughby*, 345 U.S. 83, dealt with the validity of Army assignments and decisions by the Army as to the nature of duty to be performed by servicemen. They do not deal with the First Amendment rights of servicemen. Compare *In Re Brown v. Brown, supra*, where the court held that an allegation that a transfer was made punitively because of the exercise of First Amendment rights must be resolved by the civilian courts.

counter to numerous decisions holding that it is courts, not separate agencies like the military, who retain the final decision regarding the extent and exercise of First Amendment rights.[12] Moreover, the hostility the military officials here exhibited toward the exercise of First Amendment rights by servicemen[13] and civilians[14] makes plain that by yielding to the military the determination of when servicemen will be allowed First Amendment rights ensures that the exercise of such rights will be non-existent.

b. The District Court stated that servicemen constitute a "specialized community". Whatever validity this view may have had in earlier days, it certainly does not comport with the realities of modern everyday life. As Professor Bishop stated in *Collateral Review of Courts Martial*, 61 Columbia L. Rev. 40, 70-71 (1961):

> ". . .the main reason. . .that. . .courts should draw as little distinction as possible between. . .soldiers and other citizens is simply that, if there ever was a time when the Army could rationally be described as 'a separate community' with a separate system of government, that time is long past.[15] Most male citizens of the United States

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12. *Tinker v. Des Moines School District*, *supra*; *United States v. Robel*, 389 U.S. 254, 264; *Thornhill v. Alabama*, 310 U.S. 88, 96; *Schneider v. State*, 308 U.S. 147, 161; *In Re Brown v. Brown*, *supra*.

13. See remarks of Lt. Col. Trippitt, *supra*, p. 5, and Col. Maertens, *supra*, p. 7.

14. See remarks of General Hollingsworth, *supra*, p. 5-6, *New York Times*, (Dec. 17, 1970) pp. 1, 36. *Washington Star* (Dec. 16, 1970) p. 1.

15. In *The Bill of Rights and the Military*, 37 N.Y.U.L.Rev. 181, former Chief Justice Warren pointed out (at p. 187) that at the time of Washington's inauguration, our authorized army strength was 840, and the number of men actually in the army was 672. Our present armed services number approximately 3 million. Obviously, in the light of so vast a change in the military establishment, it is necessary to change our concepts of the rights of servicemen.

> (and a fair number of the female ones) have a relation to the armed forces as direct and personal as that of a citizen of Pericles Athens or the Roman Republic in the days of Cato the Censor. My objection to the 'separate community idea is not simply that it does not square with the facts. On the basis of the experience of many nations in many times, I believe that concept to be actually pernicious, as is any way of thinking which tends to make the armed services an enclave of the national polity whose inhabitants are of other caste that the rest."

The concept that soldiers constitute a "specialized community" set apart from the rest of civilian society runs counter to the underlying principle of our Armed Forces, namely, that ours is a citizen's army in which a serviceman is a citizen first and a soldier second.[16] Attempts, such as that by the District Court, to isolate the military must be resisted less the military becomes an independent and dominant force in our society.

c. The District Court believed that servicemen should not be permitted to express their views in a public meeting because to do so would "generate. . .such discontent with the Vietnam war among servicemen that the political decision to involve this

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16. President Nixon has stated "I believe that every man in uniform is a citizen first and a serviceman second and we must resist any attempt to isolate or separate the defenders from the defended." (*New York Times*, June 5, 1969, p. 30; Col. 7.)

Senator Sam Ervin has expressed a similar sentiment stating:". . .basic to the goal of making military personnel, 'first class citizens in every respect', is to insure that they are accorded the rights, privileges and protections guaranteed to every American citizen under the Constitution." Joint hearings before the Sub-committee on Constitutional Rights of the Committee on the Judiciary, 90th Cong., 2d Sess., p. 451. See testimony of Judge Quinn before the Sub-committee on Constitutional Rights of the Committee on the Judiciary, 87th Cong., 2d Sess., p. 181.

nation in such a war might be influenced, if not reversed," Appendix D. p. 38.[17] The court's rationale discloses a fundamental misconception regarding the First Amendment and the principles underlying our form of government.

The First Amendment, this Court has stated, embodies "the profound national commitment to the principle that debate on public issues should be universal, robust and wide open. . ." *New York Times v. Sullivan*, 376 U.S. 254, 270. Such wide open debate ensures that all citizens have the opportunity to freely express their views, for it is felt that the proper course of action in any given situation will be arrived at through open discussion and the free interchange of ideas.

The protection given to speech was intended "to assure unfettered exchange of ideas for the bringing about of political and social changes desired by the people," *Roth v. United States*, 354 U.S. 476, 484, and its abridgment "impairs those opportunities for public education that are essential to effective exercise of the power of correcting error through the process of popular government." *Thornhill v. Alabama*, *supra*, at 95. *See Stromberg v. California*, 283 U.S. 359, 369.

In short, the First Amendment protects and was designed to foster the very interchange of ideas which the military and the courts below sought to stifle. The fact that as a result of the requested public meeting servicemen might have re-examined their own ideas and might, in some cases, have changed these ideas is no reason to prevent the meeting from taking place, for this is "precisely one of the types of activity envisioned by the Founders in presenting the First Amendment for ratification." *Wood v. Georgia*, 370 U.S. 375, 389.

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17. The court stated that the meeting would expound the thesis that the Vietnam war was an "immoral war, engaged in wrongfully and carried on inhumanely," Appendix B, p. 37. However, the petition states that the meeting was open to any "enlisted man or officer at Fort Jackson" and it is incorrect to assume that only one point of view would have been expressed.

d. The District Court further justified the denial of these "classic rights" on the ground that a public meeting might conceivably be "disruptive" of discipline or "promote discontent with military responsibilities", Appendix D, p. 38. This was but an application of the principle repeatedly rejected by this Court, most recently in *Tinker v. Des Moines School District, supra*, where the Court said at p. 508: ". . .undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression." *Accord Terminiello v. Chicago*, 337 U.S. 1; *Brown v. Louisiana*, 383 U.S. 131, 133.

The military desire to maintain discipline and punish those who disobey orders can be achieved by a less drastic method than prohibiting all public speech by servicemen. As the Department of Defense Directive 1325.6 (Sept. 12, 1969) recognizes, the military has a wide arsenal of specific statutes available to punish speakers at a meeting who engage in unlawful conduct or those who refuse to perform their duties.[18] Such action would permit the military to impose punishment for defined conduct, in the context of actual, not imagined injury to its discipline or violation of its laws. *Kunz v. New York*, 340 U.S. 290, 294. *Resistance v. Commissioners*, 298 F. Supp. 961, 963 (E.D. Pa. 1969).

e. The District Court sustained the validity of F. J. Reg. 600-50 which establishes a system of prior censorship without inclusion of any ascertainable standards,[19] despite the fact that

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18. *E.g.*, 18 U.S.C. §1381 ("enticing desertion"); 18 U.S.C. § 2387 ("Counseling insubordination, disloyalty, mutiny or refusal of duty"); 10 U.S.C. § 917 ("provoking speech or gestures"); 10 U.S.C. §882 ("soliciting desertion, mutiny, sedition."); 10 U.S.C. §889 ("disrespect toward his superior commissioned officer"); 10 U.S.C. §892 ("failure to obey a lawful order or regulation").

19. The District Court sought to read the standard contained in Army Regulation 210-10 ¶5-5, loyalty, discipline and morale, into F. J. Reg. 600-50 and argued that these standards are constitutionally sufficient, Appendix D., p. 34 However, it is clear that these standards do not meet the test of constitutionality as set forth by this Court in *Shuttlesworth v. Birmingham*, 394 U.S. 147.

such a regulation clearly conflicts with numerous cases in this Court declaring the provisions of such a regulation violative of the First Amendment. *Shuttlesworth v. Birmingham*, 394 U.S. 147; *Interstate Circuit, Inc. v. Dallas*, 390 U.S. 676; *Staub v. City of Baxley*, 355 U.S. 313; *Kunz v. New York*, 340 U.S. 290; *Saia v. New York*, 334 U.S. 558; *Hague v. C.I.O.*, 307 U.S. 496.

It reached this conclusion on the ground that courts should not require "the same precision and specificity of standards in a military regulation as in a criminal statute." Appendix D, p. 36. However, the court cites no authority—indeed, there is none—for the novel proposition that military regulations should not contain the same specific standards as criminal statutes. In addition, since violation of the regulation subjects a serviceman to a court-martial, there is no rational basis for lesser standards to apply to the regulation than to a criminal statute.[20]

Accordingly, this case poses important questions, requiring resolution by this Court, of when and to what extent First Amendment rights may be limited by military commanders and the extent to which such proscriptions are subject to judicial review.

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20. The reasons for the constitutional invalidity of a regulation at Fort Bragg, North Carolina similar to F. J. Reg. 600-50 are discussed in greater detail in the petition for certiorari in *Yahr v. Resor*, October Term, 1970, which seeks to review a decision of the Fourth Circuit upholding the Post Commander's refusal to allow distribution of a servicemen's newspaper on post.

Conclusion

The widespread dissent among the youth of the country against the events in Southeast Asia and the military and foreign policy of our country is a matter of common knowledge. Under present laws, such views do not exempt young men from induction into the Armed Services. The Army here asserts the right to control and suppress these dissenting views during the term of their military service. Only this Court can give fulfillment to the belief of these young men that their induction into the Armed Services does not carry with it the denial of their First Amendment rights as citizens of the United States. The petition for certiorari should be granted and the judgment reversed.

Respectfully submitted,

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Dated: December 23, 1970.

APPENDIX A

Statutes and Regulations

Army Regulation 210-10, 5-5

Protection of loyalty, discipline and morale.

a. Objectives. The maintenance of loyalty, discipline, and morale among Army troops is essential if the Army is to continue to provide a reliable and effective military force responsive to the national security missions assigned pursuant to lawful authority. At the same time, troops are generally entitled to the free access to news and publications which other citizens enjoy.

b. Responsibilities. Installation commanders will encourage and promote the availability to service personnel of books, periodicals, and other amusement media which present a wide range of viewpoints on public issues. Such media should include those emphasizing the standards of loyalty, patriotism, and discipline which are common to the armed forces. However, installation commanders will not, except as provided in this paragraph, take action to control or restrict the dissemination of publications, even if such publications are believed to be in poor taste or unfairly critical of Government policies or officials. The installation commander will be guided by the principle that, except in cases in which a publication constitutes a clear danger to military loyalty, discipline, or morale, military personnel are entitled to the same free access to publications as are other citizens.

c. Restrictions on disseminations of publications. If it appears that the dissemination of a publication presents a clear danger to the loyalty, discipline, or morale of troops at his installation, the installation commander may, without prior approval of higher headquarters, delay the distribution of any publication which he considers undesirable, on property subject to his control. The commander will consider whether the act of

restriction will in itself result in the publication in question achieving notoriety and increased circulation to military personnel through off-post sources.

d. Reports. Concurrently with imposing a delay as authorized in *c* above, the installation commander will so inform the next major commander and Headquarters, Department of the Army (Chief of Public Information, extention 74200), and request from Headquarters, Department of the Army, approval to prohibit the distribution of that publication or the particular issue thereof. Telephonic communication will be used in each instance. If the publication in question is one which is unlikely to be available at Headquarter, Department of the Army, a copy of the publication or a transcript of the text of the portion giving rise to the dissemination restriction will be forwarded to Headquarters, Department of the Army, by the fastest available means. The delay in distribution will remain in force until the decision to approve or disapprove the request is made. These reports are exempt under provisions of paragraph 7-2a, AR 335-15.

e. Distribution outlets. An installation commander may, in his discretion, impose a requirement that distribution of publications may not be made except through regularly established and approved distribution outlets, unless prior approval is obtained from the commander or his authorized representative. The installation commander may, without informing higher headquarters or Department of the Army in advance, take appropriate action to prevent the distribution of publications by persons who have not obtained the required approval. Except where the publication in question is published primarily for advertising or promotional purposes, a denial of a request for permission to distribute a publication will be reported as required in *d* above.

Appendix A—Statutes and Regulations

Fort Jackson Regulation TC 600-50

Standards of Conduct for Fort Jackson Military and Civilian Personnel

1. PURPOSE. This regulation prescribes standards of conduct for Fort Jackson military personnel, dependents of military personnel residing on post, and civilian employees.

2. POLICY. a. All personnel will refrain from any conduct which is in violation of applicable civilian or military law or which is prejudicial to good order and discipline.

b. All personnel will refrain from any private business or professional activity or from having any direct or indirect financial interest which would place them in a position where there is a conflict between their private interests and the public interest of the United States, particularly, those related to their duties and responsibilities.

3. PROHIBITED PRACTES. In addition to the prohibitions included in paragraph 2 above, the following practices are prohibited on this installation:

* * *

d. Distribution of publications such as books, periodicals, pamphlets, handbills, flyers, advertisements, and similar printed material at Fort Jackson may not be made except through regularly established and approved distribution outlets unless prior approval is obtained from the installation commander or his authorized representative. Approved outlets are the Post Exchange and its branches, the Post Library, and the official offices and designated agencies of the installation. Individuals desiring to distribute unofficial publications of any kind within the reservation will submit copies of material to G1 for approval by the Commanding General prior to effecting dissemination.

APPENDIX B

Opinion of the Court of Appeals

UNITED STATES COURT OF APPEALS
For the Fourth Circuit

No. 14,390

STEPHEN DASH, et al.,

Appellants,

—versus—

The Commanding General, Fort Jackson, South Carolina, and the Secretary of the Army,

Appellees.

Appeal from the United States District Court for the District of South Carolina, at Columbia. Donald Russell, District Judge.

(Argued June 2, 1970 Decided September 2, 1970.)

Before BOREMAN and BUTZNER, Circuit Judges, and WIDENER, District Judge.

David Rein (Leonard B. Boudin; Rabinowitz, Boudin & Standard; and Thomas Broadwater on brief) for appellants; Joseph O. Rogers, Jr., United States Attorney for the District of South Carolina, and Wistar D. Stuckey, Assistant United States Attorney, (Lt. Col Arnold I. Melnick on brief) for appellees.

Appendix B—Opinion of the Court of Appeals

PER CURIAM:

Soldiers stationed at Fort Jackson, South Carolina, appealed from a judgment of the district court that upheld the constitutionality of a regulation prohibiting the distribution of printed material without the post commander's approval and sustained the commander's denial of their request for a public meeting on the post. With his usual thoroughness, Judge Russell carefully balanced the competing interests founded on the First Amendment and the constitutional grants of power for the government and regulation of the military. We affirm on his opinion, Dash v. The Commanding General, 307 F. Supp. 849 (D.S.C. 1969).

APPENDIX C

Judgment

UNITED STATES COURT OF APPEALS
for the
Fourth Circuit

No. 14,390.

Stephen Dash, et al.,

Appellants,

vs.

The Commanding General, Fort Jackson, South Carolina, and the Secretary of the Army,

Appellees.

Appeal from the United States District Court for the District of South Carolina.

This cause came on to be heard on the record from the United States District Court for the District of South Carolina, and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, affirmed.

_____
Clerk

A True Copy,
Samuel W. Phillips, Clerk

By s/_____
Deputy Clerk

APPENDIX D

Opinion of the District Court

IN THE DISTRICT COURT OF THE UNITED STATES

For The District of South Carolina
Columbia Division

OPINION and ORDER
Civil Action No. 69-303

STEPHEN DASH, MANCE SEWELL, ALVIN M. WEBB, EDILBERTO CHAPARRO, JOSEPH F. COLE, ANDREW C. PULLEY, HUBERT L. GILLIARD, EUGENE J. RUDDER, CURTIS E. MAYS and JOSEPH MILES,

Plaintiffs,

vs.

THE COMMANDING GENERAL, Fort Jackson, South Carolina, and SECRETARY OF THE ARMY, Washington, D.C.,

Defendants.

This is an action for declaratory judgment. The plaintiffs were at the time of the commencement of the action non-commissioned servicemen stationed at Fort Jackson, South Carolina. Their action is filed not only on their behalf but also on behalf of all enlisted personnel at such base and seeks a declaration of their constitutional rights of free speech under the Federal Constitution.

The record refers to a number of constitutional rights, which the plaintiffs claim the defendants, the Commander of the Post, and the Secretary of the Army, violated. For purposes of this proceeding, however, the plaintiffs, through their counsel, limit their claim of constitutional deprivation to two

matters:[1] (1) The regulation of the Post Commander, restricting the distribution of published materials on post; and (2) The refusal of the Post Commander to grant the plaintiffs' request to have a public, open meeting on base for the free discussion of the Vietnam war and other complaints connected therewith, as requested by a petition presented to such commander.

The circumstances that gave rise to this controversy are not disputed. They were established either by stipulation of facts or by evidence taken before me. On the basis of such record so established, both parties seek summary judgment, contending rightly that, basically, the issue is one of law, involving the constitutional rights of servicemen.

The plaintiffs—or, at least, some of them—prepared and distributed a petition requesting the Post Commander to allow them to have an open, public meeting on base for the purpose of "freely discuss(ing) the legal and moral questions related to the war in Vietnam and to the civil rights of American citizens both within and outside the armed forces." The petition stated it to be their "intention to hold a peaceful, legal meeting open to any enlisted man or officer at Fort Jackson." They professed a desire "only to exercise the rights guaranteed to us as citizens

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1. See pp. 44-6, Transcript:

"*Mr. Rein:* * * * We are talking solely of First Amendment rights in the very classic sense: the right to speak, the right to publish, the right to hold meetings, and the right of assembly.

"*The Court:* And is it the right of free speech as expressed in the right to hold that particular meeting?

"*Mr. Rein:* Yes * * *." P. 39, Transcript.

Again, speaking to the claims of the plaintiffs other than the two stated above, counsel for the plaintiffs stated at the conclusion of his argument:

"*Mr. Rein:* I'm not asking your Honor to set aside or give relief in these cases, because I consider that would be appropriate for separate proceedings." P. 46, Transcript.

and soldiers by the First Amendment to the U.S. Constitution." Some twelve non-commissioned servicemen signed such petition. It was presented at the office of the Post Commander, who, through an aide, refused to accept it, stating that the Army did not engage in "collective bargaining". Some days before this, an impromptu open discussion of the Vietnam war was held outside the quarters occupied by a number of the plaintiffs. In this discussion, a substantial number of servicemen took part. Considerable acrimony developed; threats were exchanged; fighting began; officers were disobeyed; and complete disciplinary control of the servicemen was for a time lost.

The Post Commander prior to the commencement of this action, issued a regulation limiting the right to distribute pamphlets on the base. This regulation, the validity of which is challenged by the plaintiffs, is as follows:

> "Distribution of publications such as books, periodicals, pamphlets, handbills, flyers, advertisements, and similar printed material at Fort Jackson may not be made except through regularly established and approved distribution outlets unless prior approval is obtained from the installation commander or his authorized representative. Approved outlets are the Post Exchange and its branches, the Post Library, and the official offices and designated agencies of the installation. Individuals desiring to distribute unofficial publications of any kind within the reservation will submit copies to G1 for approval by the Commanding General prior to effecting dessemination."

So far as the record indicates, none of the plaintiffs had been denied the right to distribute any pamphlet on base. In fact, there is no showing that the Post Commander had ever exercised his authority under this regulation.

Since the commencement of this action, all of the plaintiffs have either been released by the Army or been transferred to other bases.

The defendants contend, *in limine*, (1) that, since the real plaintiffs concerned with a violation of alleged constitutional rights have either been discharged or transferred to other posts the proceeding is moot, and (2) that the plaintiffs have failed to exhaust their military remedies and that, absent such exhaustion, jurisdiction does not vest in this Court.

Neither preliminary objection raised by the defendants is, in my opinion, meritorious. The issues posed are continuing ones, involving restraints not alone on the plaintiffs but on all non-commissioned personnel, present or future, at the base. If, by either the release or transfer of the plaintiffs, the power of the Court to resolve such issues could be destroyed, the rights asserted by the plaintiffs might never be determined since the defendants, who control such releases or transfers, could effectively prevent a review of their actions. Under such circumstances where the problem is "capable of repetition, yet evading review", the mere transfer or release of all or a part of the plaintiffs will not render the proceedings moot. *Moore v. Ogilvie* (1969), 394 U.S. 814, 816; cf., *Hall v. Beals* (1969), ____ U.S. ____, filed November 24, 1969.

Similarly, it is obvious that there is no recourse for the plaintiffs within the military hierarchy. The plaintiffs, for all practical purposes, have exhausted every administrative remedy available to them within the military. Further action in this regard would be futile in any attempt by the plaintiffs to assert First Amendment rights. The courts are appropriately available to them now for the vindication of such rights, if rights they have. See, *United States Ex Rel. Brooks v. Clifford* (4th Cir. 1969) 409 F.2d 700, rehearing denied 409 F.2d 700.

Turning to the merits of this controversy:

Appendix D—Opinion of the District Court

At the outset it should be noted that a serviceman's right of free speech is not absolute.[2] With his induction into military service, he "necessarily accepts some abridgment of his right of free speech."[3] Thus, in a recent attempt to order and rationalize existing decisions interpreting the First Amendment, a thoughtful commentator explicitly refrained from incorporating the military into the general scheme of such rights, remarking that, "To a certain extent, at least, the military sector or society must function outside the realm of democratic principles, including the principle of freedom of expression" and, "Certainly, members of the armed forces, at least when operating in that capacity, can be restricted in their right to open discussion."[4] This is true because, as the Supreme Court has put it, "The military constitutes a specialized community governed by a separate discipline from that of the civilian."[5] It has been aptly observed that, "An army is not a deliberative body,"[6] and, it may be added, it cannot function as a debating society. "Its law is that of obedience" and discipline, and its strength lies in "Vigor and efficiency on the part of the officer and confidence among the soldiers * * *."[7] As a recent decision phrases it, "The need for discipline (in the Army), with the attendant impairment of certain rights, is an important factor" in the operation of an Army.[8]

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2. *Callison v. United States* (9th Cir. 1969) 413 F.2d 133, 135-6.

3. Special Preparedness Subcomm. of the Sen. Comm. on Armed Services, Military Cold War Education and Speech Review Policies 3 (Comm. Print 1962), cited in 81 Har. L. Rev. 1743, note 273.

4. Emerson, *Toward a General Theory of the First Amendment*, 72 Yale L. Journal, 877 (1963).

5. *Orloff v. Willoughby* (1953) 345 U. S. 83, 94, 73 S. Ct. 534, 97 L. Ed. 842, reh. den. 345 U. S. 931, 73 S. Ct. 779, 97 L. Ed. 1360.

6. *In re Grimley* (1890) 137 U. S. 147, 153, 11 S. Ct. 54, 34 L. Ed. 636.

7. *In re Grimley, supra*, at p. 153 (137 U. S.).

8. *Raderman v. Kaine* (2d Cir. 1969) 411 F.2d 1102, 1104.

To say that a serviceman's right of free speech is limited is not an entirely anomalous principle. Even among civilians, the right of an individual to exercise First Amendment rights may be legally circumscribed by the character of his public employment or by the circumstances, place and time where the right is sought to be exercised.[9] Accordingly, in *Pickering v. Board of Education* (1968) 391 U. S. 563, 568, 88 S. Ct. 1731, 20 L. Ed. 2d 811, the Court said, "At the same time it cannot be gainsaid that the State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general." See, also, *United Public Workers v. Mitchell* (1947) 330 U. S. 75, 67 S. Ct. 556, 91 L. Ed. 754. And, in *Goldwasser v. Brown* (C.C.A. D.C. 1969) ____ F.2d ____, filed September 17, 1969, a civilian employee of the Air Force, discharged as a teacher because of comments made in the classroom to foreign officers on the Vietnam war, assailed his discharge as a violation of his First Amendment rights. In denial of such claimed violation, the Court said:

> "We would also be blinking reality if we did not recognize that a class of foreign military officers at an Air Force installation on invitational orders presents special problems affecting the national interest in harmonious international relations. We are certainly not equipped to second guess the agency judgment that the instructional goals of the Air Force program would be jeopardized by the teacher's volunteering his views on subjects of potential explosiveness in a multi-cultural group."

Moreover, "the rights of free speech and assembly, while fundamental in our democratic society, still do not mean that

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9. *Callison v. United States, supra* (413 F.2d, p. 136).

everyone with opinions or beliefs to express may address a group at any public place and at any time."[10] In short, where First Amendment rights are involved, whether of civilian or serviceman, the issue always involves the balancing by the Courts of the competing private and public interests at stake in the particular circumstances.[11]

It does not follow, however, that, contrary to certain early judicial expressions,[12] First Amendment rights are completely inapplicable to servicemen. Indeed, the Court of Military Appeals, applying as it understood the decision in *Burns v. Wilson* (1953), 346 U.S. 137, 73 S. Ct. 1045, 91 L. Ed. 1508, has held that "servicemen have all the protections of the Bill of Rights except such as are expressly or by necessary implication not applicable by reason of the peculiar circumstances of the military."[13] But the Courts have been understandably loath to overturn military decisions where military personnel is concerned. After all, it is not the function of courts to "regulate the army"[14] and "judges are not given the task of running the Army."[15] Courts muste be "scrupulous not to interfere with legitimate Army matters"[16] and are required to give "a

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10. *Cox v. Louisiana* (1965) 379 U. S. 536, 554; *Adderley v. Florida* (1966) 385 U. S. 39, 48, note 7.

11. See Kester, in 81 Har. L. Rev. 1752, and Emerson, *supra*, at p. 912.

See, also, Fried, *Two Concepts of Interests: Some Reflections on the Supreme Court's Balancing Test*, 76 Har. L. Rev. 755 (1963).

12. *Ex Parte Milligan* (1866) 71 U. S. 2, 138, 18 L. Ed. 281; *Reaves v. Ainsworth* (1911) 219 U. S. 296, 304, 31 S. Ct. 230, 55 L. Ed. 225; Miller, *A Long Look at Article 15*, 28 Mil. L. R. 37, 47.

13. Miller, *A Long Look at Article 15*, 28 Mil. L. R. 37, 48-9; *United States v. Voorhees* (1954) 4 U.S.C.M.A. 509; *United States v. Jacoby* (1960) 11 U.S.C.M.A. 428.

14. *Reaves v. Ainsworth, supra* (219 U.S. P. 306).

15. *Orloff v. Willoughby, supra* (345 U. S. p. 93).

16. *Orloff v. Willoughby, supra* (345 U. S. p. 94).

substantial degree of civilian deference to military tribunals. In reviewing military decisions," the Courts "must accomodate the demands of individual rights and the social order in a context which is far removed from those which" the Courts "encounter in the ordinary run of civilian litigation, whether state or federal. In doing so", the Courts "must interpret a legal tradition which is radically different from that which is common in civil courts."[17] Chief Justice Warren in *The Bill of Rights and the Military*, 37 N. Y. Univ. L. Rev. 181, 186-7 (1962) has stated the proper judicial role in this connection thus:

> "So far as the relationship of the military to its own personnel is concerned, the basic attitude of the Court has been that the latter's jurisdiction is most limited. * * *
>
> "This 'hands off' attitude has strong historical support, of course. While I cannot here explore the matter completely, there is also no necessity to do so, since it is indisputable that the tradition of our country, from the time of the Revolution until now, has supported the military establishment's broad power to deal with its own personnel. The most obvious reason is that courts are ill-equipped to determine the impact upon discipline that any particular intrusion upon military authority might have."

There are few instances of a judicial application of these rules in a context similar to that posed by the plaintiffs. In *United States v. Bradley* (4th Cir. 1969) ____ F.2d ____, filed November 28, 1969, which involved a distribution of hand bills on an army post *but not by servicemen*, the Court decided the

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17. *Noyd v. Boyd* (1969) 395 U. S. 683, at p. 694, 89 S. Ct. 1876, 23 L. Ed. 2d 610.

case on other grounds and found it "unnecessary to decide constitutional questions raised". It is unlikely, however, that the Court would have found the rights of a serviceman on post identical with that of a civilian, even though on post. In *Callison v. United States, supra,* a draftee, in process of induction, sought to induce other inductees at the induction center to sign a petition opposing the draft and the war in Vietnam. Ordered to desist, he disobeyed, claiming the right to distribute his petition under the First Amendment. The Court held that "the order to refrain from soliciting signatures was not an impermissible intrusion upon appellant's First Amendment rights and was entitled to respect and obedience." 413 F.2d at p. 135. Professor Kester, in 81 *Har. L. Rev.* 1697, "*Soldiers Who Insult the President: An Uneasy Look at Article 88 of the Uniform Code of Military Justice*" (1968), was commenting critically on a case[18] in which the offensive remark about his Commander in Chief made by a commissioned officer found violative of Article 88[19] was made off base "isolated from any military audience and was found by the Court of Military Appeals without constitutional protection (page 1768, 81 *Har L. Rev.*). He was particular to note, however, that, "A post commander's restriction on public statements after increased discipline problems caused by public dissent by his personnel might be constitutionally acceptable" (pp. 1764-5, 81 *Har. L. Rev.*). Actually, he suggested that Article 88 which forbids contemptuous words spoken of the President by a serviceman, "should be redrafted to exclude specifically all utterances but those published or *made to public gatherings,* or those made not in ordinary conversation but in an unsolicited effort to proselytize military personnel." (p. 1766, 81 *Har. L. Rev.*) Italics added.

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18. *United States v. Howe,* 17 U.S.C.M.A. 165, 37 C.M.R. 429

19. Art. 88, Section 888, 10 U.S.C.A.

The author's criticism centered on the place where questioned statement was made, i.e., *off post* and *to an almost wholly non-military audience. Goldwasser,* to which reference has heretofore been made and in which no infringement of free speech rights was found, involved criticisms leveled at our involvement in Vietnam made within the classroom by a civilian employee of the Defense Department, serving as a language instructor for foreign military personnel being trained in this country.

Despite the absence of any specific decisional authority on our specific issues, it would appeal plain from the foregoing general principles that, within certain limits, the military establishment should have authority to restrict both the distribution of printed materials and the holding of public discussion meetings on post. The right to restrict, however, must no doubt be kept within reasonable bounds; it is not, and cannot be, a completely limitless power. And, however hesitant they may be to "intrude", Courts will be available to determine whether there is a reasonable basis for such restrictions as may be placed on the serviceman's right of free speech by the military establishment.

The restriction placed on the distribution of printed material at Fort Jackson (T.C. Reg. 600-50), to which the plaintiffs direct their first challenge, may be, as plaintiffs argue, broad and indefinite; it does not incorporate within itself any plain standards by which a pamphlet's acceptability for distribution may be adjudged. The regulation must be read, however, in conjunction with the opinion of the Judge Advocate instructing authoritatively the Post Commander in the exercise of his powers under AR 210-10, paragraph 5-5e. By these instructions, the Post Commander is required to make specific findings in support of any restriction imposed by him under the Regulation. Specifically, he is advised against any denial based on "good taste" or "in the best interests of the command" and is

instructed that he may delay distribution of a publication "only if he determines that the specific publication presents a clear danger to the loyalty, discipline, or morale of his troops." He is commanded that he "may not prevent distribution of a publication simply because he does not like its contents" and "The fact that a publication is critical—even unfairly critical—of Government policies or officials is not in itself, a ground for denial."[20] The constitutionality of the regulation must be determined on the regulation as construed and defined in these instructions issued by the Judge Advocate, controlling the application by the Post Commander of the regulation. See the concurring opinion of Justices Black and Douglas in *Gregory v. Chicago* (1969) 394 U. S. 111, 113, 89 S. Ct. 946, 22 L. Ed. 2d 134, and concurring opinion of Justice Harlan in *Shuttlesworth v. Birmingham* (1969) 394 U. S. 147, at p. 159, 89 S. Ct. 935, 22 L. Ed. 2d 162. So limited and defined, the challenged Regulation would appear to be within the authority of the Post Commander. Whether the Post Commander, in the exercise of his authority under the Regulation as limited and defined by the commands of the Judge Advocate, acts arbitrarily or capriciously, without proper justification, in a particular instance is a question which will arise when the Post Commander has exercised his authority under the Regulation. So far as the record shows, he has never exercised the authority to restrict the distribution of any printed material. What is involved in this proceeding, so far as distribution of printed material is concerned, is the bare right of the Post Commander, in those cases where there is a reasonable basis for the conclusion that the distribution represents " a clear danger to the loyalty, discipline, or morale of his troops," to prohibit the distribution

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20. See, General Release, Office of The Adjutant General, Department of the Army, dated May 28, 1969, Subject: Guidance on Dissent and issued by Order of the Secretary of the Army.

of such printed material. I find he has such power. As I have said, however, whether he has properly exercised such power in a particular situation is an issue that can only be resolved when that situation arises.

It is urged by the plaintiffs that, even if the challenged regulation be limited as the Judge Advocate has ruled, it still is too vague to meet constitutional requirements. In support of this contention, they rely on *Shuttlesworth, supra*. That case, however, involved a criminal ordinance and dealt with the rights of a civilian seeking to exercise his constitutional rights on the public streets. Here, on the other hand, we are dealing with a military regulation governing conduct on a military training base. It seems settled that the Courts do not require the same precision and specificity of standards in military regulations as in a criminal statute.[21] Actually, language very similar to that used in the Judge Advocate's instructions was sustained against constitutional attack in *Cafeterial Workers v. McElroy* (1961) 367 U. S. 886, 894-6, 81 S. Ct. 1743, 6 L. Ed. 2d 1230. The regulation in that case, which was upheld, phrased the Commander's authority in the terms of "good order and military discipline". (p. 893) In *Weissman v. United States* (10th Cir. 1967) 387 F.2d 271, 274, the action of the Post Commander was based on a finding that the conduct was "prejudicial to good order and discipline"; it was sustained against attack. As a matter of fact, the language used by the Judge Advocate in marking out the limits of the regulation seems as clear as the circumstances admit. Of course, the power under such regulation may be abused. Should the Post Commander be unable to show any possible reasonable basis for his determination, remedies are available for redress in the

21. See, 81 Har. L. Rev. at p. 1751.

Courts. But there is, as I have said, no contention that the power has been so abused; the attack is on the power to restrict. That attack, in my opinion, must fail.

Likewise, the Post Commander has the authority, in a proper case, to deny servicemen under his command the right to hold on post public meetings. So much, Professor Emerson, in his scholarly and exhaustive discussion of the constitutional right of free speech in 72 *Yale L. Journal* 936, quoted *supra* recognizes. Again, though, this power must be exercised only where it is reasonably possible that the meeting might represent "a clear danger to military loyalty, discipline or morale of the military personnel" at the post. Moreover, Courts have both the responsibility and the duty to interfere where such power is exercised, either arbitrarily or capriciously, without a proper basis. Accordingly, the question becomes: Did the Post Commander have a proper basis for denying the petition for an open, public meeting and discussion on post?

It is the position of the defendants that the very nature of the subjects to be discussed at the meeting, taken in conjunction with the known views of the promoters of the meeting, warrants the conclusion that the meeting would have created unrest, provoked disorder and weakened discipline and morale among the military personnel at the base.

While the plaintiffs assert the purpose of the meeting was to discuss peaceably the justification of the Vietnam engagement and the right of the Post Commander to abridge such right of discussion, their own view of the issue to be discussed was plain: To them, the Vietnam war is an immoral war, engaged in wrongfully and carried on inhumanely. It must be assumed that a meeting, promoted by the plaintiffs, would seek to develop and expound that thesis. Can it be disputed that such a meeting, held on post and directed particularly at servicemen being trained to participate in that very war, would likely be

calculated to breed discontent and weaken loyalty among such servicemen? Can training for participation in a war be carried on simultaneously with lectures on the immorality or injustice of such war? In my opinion, the denial of the right for open, public meetings at advertised meetings on post for discussion of the propriety of the political decision to participate in the Vietnam war was justified "by reason of the peculiar circumstances of the military" and represented no infringement of the constitutional rights of the plaintiffs or others similarly situated. Off base, as parts of the great mass of our nation's citizenry, they may well be entitled to First Amendment rights, they should no doubt be granted the right of all other citizens to exercise the freedom to dissent and to criticize. This right was stated and upheld in the instructions of the Judge Advocate, already cited. But to organize meetings on base, to seek to create of and within the military itself a cohesive force for the purpose of compelling political decisions—and political decisions directly related to the mission of the military itself—would undermine civilian government, especially civil control of the military, and would take from responsible civilian government the power of decision. And this plainly was the purpose of the meeting sought by the plaintiffs. They sought to generate, through their meeting, such discontent with the Vietnam war among servicemen that the political decision to involve this nation in such war might be influenced, if not reversed. This they may have a constitutional right to do off base and as individual citizens, despite the fact that they were members of the armed services. But this is quite different from their right to organize on base among military men meetings to promote discontent with their military responsibilities and tasks.

Moreover, the defendant offered proof that an impromptu open meeting, created by some of the plaintiffs and providing

an opportunity for the discussion on base of the very subjects sought to be discussed at the public meeting solicited in the petition of the plaintiffs, had created disorder, formented dissension, and given rise to serious breaches of discipline. Such evidence clearly demonstrated the reasonableness of the Post Commander's action.

The plaintiffs, citing *Tinker* v. *Des Moines School Dist.* (1969) 393 U. S. 503, 89 S. Ct. 733, 21 L. Ed. 2d 731, and like cases, however, would liken their claim of a constitutional right to hold such meetings on post to the right of college or school students to have such meetings on school premises. It should be noted at the outset that, in the *Tinker Case*, the Court was careful to point out that "the record does not demonstrate any facts which might reasonably have led school authorities to forecast substantial disruption of or material interference with school activities", as a result of permitting the plaintiff to wear an armband during school hours indicating his opposition to the war in Vietnam. (393 U. S. at p. 514) In fact, the single question posed in the petition for certiorari in that case limited the claim or First Amendment right to acts "not disruptive of school discipline or decorum",[22] Such is clearly not the case here. The events of the impromptu open meeting provide a reasonable basis for concluding that such a meeting as that proposed by the plaintiffs, held on post, would be "disruptive" of discipline and interfere with the military functions of the base. Moreover, there is a fundamental difference between both the role and the operations of a military training base and a school or college. At the military base, the serviceman's training is in discipline and obedience. The school or college, on the other hand, is, to quote the language of the Court in *Keyishian* v. *Board of Regents* (1967) 385 U. S. 589, 603, 87 S. Ct. 675,

22. See dissenting opinion of Justice Black, p. 515, note 1, 393 U. S.

17 L. Ed. 2d 629, "peculiarly the 'marketplace of ideas'." It is a place for free and unrestricted inquiry, for the discovery of truth through open discussion and the frank dissection of conflicting viewpoints. Commenting on the *Tinker Case*, the editors in 83 Har. L. Rev. 159, put it that schools are places for "open, vigorous, disputations, disturbing" discussions and speeches—certainly not an apt description of a military training base. Because of the obvious differences both in purposes and in necessary operations, it is thus clear that the rules applicable to conduct in a military base and in a school or college must be and are entirely different and that authorities sustaining First Amendment rights of students are inapplicable to the determination of the rights of servicemen on base.

It is therefore, my opinion that the motion of the defendants for summary judgment should be granted, and

IT IS SO ORDERED.

DONALD RUSSELL
United States District Judge

Dated:
Spartanburg, South Carolina
December 19, 1969.